ARRIVAL AND DEPARTURE OF UNION PACIFIC TRAINS.—Main Line.

ARRIVE.

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| Mail and Express | 7.20 p.m. |
| Limited | 1.20 a.m. |

DEPART.

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| Mail and Express | 8.30 a.m. |
| Limited | 6.48 p.m. |

UTAH & NORTHERN AND OREGON SHORT LINE.

ARRIVE.

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| Mail and Express | 11.20 a.m. |
| Accommodation | 9.55 p.m. |

DEPART.

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| Mail and Express | 4.10 p.m. |
| Accommodation | 8.03 a.m. |

ECHO AND PARK CITY.

ARRIVE.

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| Mail and Express | 11.20 a.m. |

DEPART.

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| Mail and Express | 4.10 p.m. |

The 8.03 a.m. train, leaving Salt Lake, and the 7.20 p.m. train, arriving at Salt Lake, carry through Pullman Sleepers between Salt Lake City, Cheyenne, Denver and Kansas City. The limited trains carry Sleepers both east and west bound between Ogden and Council Bluffs.

Sleeping car reservations can be secured for either east bound trains or for the Utah & Northern and Oregon Short Line trains, by application to the Union Ticket Office at Salt Lake City or Ogden.

J. V. PARKER,
Division Pass Agt.

## THE CALTON CASE.

### The Decision of the Lower Court Affirmed,

### BUT HENDERSON DISSENTS.

**A Writ of Error Asked for—Sentence Suspended—The Full Text of the Opinion.**

Below will be found the opinion delivered yesterday in the case of Andy Calton. Judge Henderson dissented on the question of Mr. Dickson, who was employed to assist the prosecution, making the closing argument to the jury. A writ of error was applied for and sentence deferred:

At the September term of the District Court of the Second Judicial District the appellant was found guilty by a jury of the crime of murder in the first degree. A motion for a new trial having been submitted and overruled and the defendant, as was his legal right, having elected shooting as the mode of punishment, the Court sentenced him to be shot on the 26th day of November, 1887. From that judgment he has appealed to this Court.

The first ground of reversal relied upon by the defendant, in the order we will consider the errors assigned, is that the evidence was insufficient to authorize the verdict.

IT APPEARS FROM THE EVIDENCE

given on the trial that the deceased, Michael Cullen, and the appellant, Andrew Calton, and one Jerry Tiberty were acquaintances and were residents of Star Mining District, in the Territory of Utah; that about 10 o'clock of the morning of July 14, 1887, these men met a few miles away in the town of Milford, the two last named having gone there together. Tiberty testified to this effect: When they alighted, Michael Cullen came up and they went into a saloon and drank with him; that during the day they drank together five or six times, once or twice they had beer, the other times whisky. It appears that they started home about 6 o'clock in the evening of the same day, Calton and Cullen sitting on the wagon seat and Tiberty lying on some ore sacks behind them; that Calton was driving and Cullen sitting to his left. Tiberty testified further; soon after they had started, they all took a drink out of a bottle, and after they had crossed the railroad, Calton's whiplash dropped off and he (witness) left the bottle on the sacks and jumped out to get the lash; while he was tying it on, Cullen asked for a drink, and witness told him he could get it if he would turn around; Cullen did so, but witness did not see whether they drank or not. He himself was busy with the whip, and when he looked up, he said: "You are fine fellows to drink without offering me any;" Calton answered, "Mike has it," and said to Cullen, "Give Jerry a drink; it is his whisky;" Cullen had the bottle under his arm, and Calton reached over and took hold of the neck of it and held on, and in the struggle that ensued some of the whisky was spilled, and witness, seeing that Cullen was not willing to give it up, said: "Damn the whisky, I do not want it," and then said, "Drive on," walking ahead a few steps, thinking they would follow; Calton got the bottle and held it up saying, "Come back, here it is, I have it; witness then went back and got it and put it in his side pocket and again said: "Drive on, I will walk, you may not get any more on the way." After taking a few steps he looked around and Calton rose straight up in the wagon, and the two men had their hands on each other's necks. He then ran back and put his foot on the hub of the front near wheel to get up and seperate them, and got in behind the seat. Calton was then leaning over the dashboard, Cullen was in his seat, and did not rise from it so far as witness saw. Witness then said: "What are you quarreling about, two friends quarreling for nothing—you ought to be ashamed of yourselves." Witness then tried to coax them to let go and finally said to them that he would put them out if they did not. He tried for a couple of minutes to separate them.

CULLEN HAD HIS HAND UP

and said: "You will choke, will you, you s—n of a b—h," and going to strike Calton. Witness ran his arm between them and "saved him from the balance." Calton then said: "Let's quit" and they both let go. Cullen was then in the seat and had not gotten out of it. Calton then picked up a bundle and jumped out of the wagon, alighting upon his feet. The team started and witness jumped from the wheel and after a little time, with difficulty, got hold of the bridle of the near horse, (his hands being crippled). He then heard Calton say, "You will abuse me," or "You will choke, you s—n of a b—h," and turning around, he saw Calton take his pistol out of the bundle he carried. Calton said after he got it out: "I don't give a damn if you are Matt. Cullen's brother; you cannot abuse me." Cullen was sitting in the seat, and it was not a half second after he saw the pistol until the first shot was fired. Calton kept on firing. Witness halloed: "I say, for Christ's sake, quit that." Cullen answered: "Oh, he is dead; the first shot killed him, and I might as well give him the rest." Witness said: "No, he is not dead," and he kept on firing, and witness kept saying: "Quit that, he is not dead." Afterwards when they were coming down to Milford, witness said: 'The second or third shot missed fire." Calton then said it was the second.

AFTER THE SHOOTING,

witness said: "Well, we must go back to Milford." Calton answered: "Yes." The witness had dropped his hat when he caught the horses, and Calton picked it up, and witness picked up Calton's and handed it to him. Witness said to Calton just as they turned around, that he wished that he had let the horses go and had tried to grab him, and Calton answered that it was no use, he would have got him anyway. Calton drove back to Milford, the body remaining on the seat by Calton, witness holding it there. As they were going back, witness said he was sorry and Calton replied that he was sorry too, that he did not pack that gun for Cullen, and he wished it had been Dan Mackintosh. Just outside the town he asked where they should drive and witness told him. After they reached Milford, Calton said on two or three occasions, when men shook hands with him, that he did not think they would shake hands with a murderer, and said to the witness, "My life is not worth one cent to me now."

Witness McKean testified: He saw the three men going out; Tiberty appeared to be sober. When they came back Calton said he shot him and shot him after he was dead. Calton told witness that the pistol was in the scabbard and witness got it. Its calibre was 44 or 45.

Dr. Fowler made a post mortem examination and testified that there were nine bullet holes on the person of the deceased; four were probably made by one bullet and three might have been made by another; they were fatal.

Witness Baldwin testified that Calton said

HE SHOT CULLEN

because he was choking him, that he shot him in self-defence. Calton also said to Dr. Hagen: "Here is your partner. I killed him and I killed him good." Calton and Tiberty acted as if they were drunk. Calton had some scars on his face and neck. Witness More testified that Calton said he killed him the first shot and thought he would put the balance of the shots in him, and was forced to kill him; that he thought Calton was then intoxicated.

A. M. Stoddard testified that Calton said he had been insulted, and bought a pistol with the intention of killing the next man who insulted him, and witness said: "I suppose you have done so now," and Calton replied, "Yes."

A. J. Lewis testified that he had known Calton four years; that he had the reputation of being a very quiet man, sometimes not speaking to any one for two or three days; that witness thought that he was crazy, and that Calton received ordinary wages as a miner.

O. S. Carver testified that he had known defendant eight or nine years, and that he was always considered a peaceable and quiet citizen.

Mr. Burnison also said that defendant had the reputation of being a peaceable and quiet man; there was evidence that

CALTON HAD ARMED HIMSELF

with a pistol on another occasion, and had made threats of violence, but there was no evidence to show that there had ever been any unfriendly feeling between him and the deceased before the fatal occasion. On the contrary there was evidence to show that they had been on friendly terms.

Owing to the nature of the case and of the alleged condition of the three men, and the alleged want of capacity of the appellant, we thought it necessary to state the evidence thus fully. This evidence proves to a moral certainty that the appellant caused the death of the deceased by a pistol shot, and that the killing was not excusable or justifiable. The further question remains, did the appellant inflict the fatal wound with such a deliberate and premeditated intention to take the life of Cullen as authorized the jury to find him guilty of murder in the first degree? It appears from the evidence that while the appellant and the deceased were engaged in an angry altercation in the wagon, attended with personal violence, when remonstrated with by the witness Tiberty, the appellant said, "Let's quit," and that the struggle then ceased; that thereupon the appellant got the bundle in which the pistol was, and jumped out of the wagon upon the ground, and saying, "You will abuse me," or "You will choke, you s— of a b—," took his pistol out of the bundle, and cursing the deceased, "I don't give a d—n if you are Matt Cullen's brother, you cannot abuse me," he said, and fired the deadly shot while Cullen was sitting upon the seat, and when Tiberty halloed to him to quit, he said,

"OH, HE IS DEAD.

The first shot killed him, and I might as well give him the rest," and when told that Cullen was not dead, kept on firing, in spite of the remonstrance of Tiberty, and afterwards, when told that the second or third shot missed, replied that it was the second.

The reasonable inference from the language and conduct of the appellant is that he formed the design of taking Cullen's life before he jumped out of the wagon, and he then commenced preparing to execute his purpose, by getting the bundle in which the pistol was, by getting into a position in jumping out of the wagon, by getting his weapon, in taking it out of the bundle and out of the scabbard, by leveling the pistol at the vitals of the deceased and by firing the deadly shots. Such preparation indicates unmistakably thought and design; it shows premeditation—a definite intention to take the life of Cullen. The means he used, the acts he performed were suited to the result—the death of the deceased. He understood the means that he used and anticipated the effect. Section 1917, Compiled Laws of Utah, 1876, gives in substance the

COMMON LAW DEFINITION OF MURDER,

viz: "Murder is the unlawful killing of a human being with malice aforethought, and section 1918 defines malice essential to murder; such malice may be express or implied; it is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart."

Section 1919 makes the distinction between murder in the first and in the second degree: "Every murder perpetrated by poisoning, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of or attempt to perpetrate any arson, rape, burglary or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree."

Section 1921 defines manslaughter: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds. First—Voluntary upon a sudden quarrel or heat of passion. Second—Involuntary, in the commission of an unlawful act

NOT AMOUNTING TO FELONY

or in the commission of a lawful act which might produce death, in an unlawful manner; or without due caution and circumspection.

While the killing shown by the evidence in this case was immediately after an angry quarrel and a violent altercation attended with heat of passion, it cannot be said that it was not in pursuance of a specific and distinctly formed intention to take the life of the deceased. There being an intention to kill and no provocation to justify or excuse it, the killing must have been malicious, unless the passion was so great that the intent resulted from it and the intention was without thought and the act of killing proceeded from the passion alone or so nearly alone, that the passion could be said to be the controlling source or author.

The unlawful killing of a human being with malice aforethought was murder at common law. Section 1919 above quoted describes two classes of murder and distinguishes one as murder in the first degree and the other as murder in the second degree. And again it distinguishes certain kinds of homicides as murder in the first degree by the act, the intent, the object, and the circumstances or by one or more of these. It describes one kind of murder in the first degree by the measure alone—the amount of deliberation which precedes it. The intent essential to murder is the state of mind—the intention at the time of the act that causes death. The law

DOES NOT REQUIRE DELIBERATION

after the intent and before the act of killing. It does require that the man shall be able and have an opportunity to think about the killing, that he may deliberate and meditate upon it; and whenever the deliberation is sufficient to form therefrom a specific and well-defined intention to kill the person afterwards slain, it is enough to characterize the killing as murder in the first degree.

On the contrary, if the action of the mind is so impeded and hindered by passion, intoxication or other sufficient cause, that it cannot, during the time intervening, sufficiently think and deliberate upon the act and its consequences, as to be able to form a distinct and perfect intention in the light of thought and reason, the premeditation is not sufficient to characterize the crime as murder in the first degree. No man, who had not the capacity or was not free to reason and think about the act, and who had not adequate opportunity to form a distinct and definite intention in the light thereof, ought to be deprived of his life for an act flowing from such an intention. As a general rule, the law disregards acts and their consequences that do not follow intentions. Therefore, an individual is not bound by an act to which he had no opportunity or capacity to form an intention. And with respect to the crime of murder, the

WANT OF DELIBERATION AND PREMEDITATION

palliates the crime to murder in the second degree, though the killing was intentional and malicious. When the act of killing does not proceed from a malicious intention, but does proceed from passion or is the result of negligence the crime is reduced to manslaughter. The law abates and yields so much on account of human infirmities.

We are of the opinion that the evidence authorized the jury to find that the appellant with the capacity and opportunity to reason and with premeditation formed a specific and distinct intention to take the life of Cullen and therefore to find him guilty of murder in the first degree.

The proposition of law that homicide is murder in the first degree when the person killing had the opportunity and the capacity to deliberate upon the act and to form a specific and distinct intention from such deliberation is supported by the following authority:

2 Bishop on Criminal Law, sec. 728.
Keanan vs. Commonwealth, Penn. State, 55.
Wharton on Criminal Law, vol. 2, sec. 1084-1106.
State vs. Bealobe, 1 Cal., 389
State vs. Williams, 43 Cal., 344.

THE APPELLANT EXCEPTS

to the following portion of the charge of the court to the jury and assigns the giving thereof as error: "To reduce homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion the provocation must have been considerable; in other words such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation such as is not calculated to engender uncontrollable passion in any ordinary man will suffice.

Counsel for the appellant contend that such provocation as would be calculated to cause irresistible passion in an ordinary reasonable man is not necessary to reduce homicide that would be murder to manslaughter. The law in selecting a human standard by which to measure human conduct selects an ordinary, not an extraordinary man, a reasonable, not an unreasonable man, for the law is based upon reason; it selects reasonable standards. It selects such a provocation as the reason of such a man would not be likely to control. In other words not such a provocation as would be calculated to awaken a passion that the reason of an ordinary man would be likely to resist. Assuming (as we must in the absence of proof of insanity or imbecility) that the appellant was a man of ordinary capacity, he should have controlled such passion as a reasonable man could restrain and would be likely to restrain.

IT IS VERY DIFFICULT

in many cases to distinguish manslaughter from murder. The act that caused death may have been wilful but death may not have been intended. The intention to kill may have been formed and life taken during or soon after an angry quarrel or amid or immediately after violence and excitement. In order to determine whether the accused in any given case acted from reason or passion, the provocation, the weapon used, if any, the preparation for the act, his expressions and all the circumstances must be considered, and although it appears that the act proceeded to some extent from malice upon reflection and calculation and to some extent from passion, that will be held to be the cause which had the preponderating influence. Passion to some extent, almost always influences the slayer, when the fatal wound is given during or soon after a quarrel or a fight; and conversely malice to some extent influences the party killing in either case. But the law charges the act to malice or passion as the one or the other is found to be the preponderating cause of the act. In ascertaining this fact, as all others in criminal cases, the jury must give the accused the benefit of any reasonable doubt. "The passion must be such as is sometimes called irresistible; yet it is too strong to say that the reason of the party should be dethroned or he should act in

A WHIRLWIND OF PASSION.

There must be sudden passion upon reasonable provocation to negative the idea of malice. And the passion must proceed from what the law accepts as an adequate cause, else it will not reduce the felonious killing to manslaughter. Bishop Crim. Law, vol. 2, Sec. 697. We find no error in giving the portion of the charge above quoted.

The defendant also alleges as error the statement to the jury of the following principle of law: "When insanity is relied upon as a defense to a criminal charge, the burden is upon the defendant to establish it, unless the evidence on the part of the prosecution tends to establish it. The test of responsibility for a criminal act, when unsoundness of mind is set up as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry." The law presumes that the mind is in its normal condition until some evidence of unsoundness or imbecility appears.

We understand that the capacity of a person accused of crime to determine whether the criminal act was right or wrong is the correct test of responsibility. If a man with ability to refuse kills another with the knowledge that it is wrong, he is responsible to the law for the act. We are of the opinion that this exception is not well taken.

The court in substance stated to the jury that the law will not permit a person who commits a crime while intoxicated to avail himself of his own

"GROSS VICE AND MISCONDUCT"

as a justification therefor. Appellant excepted to the use of the terms "his own gross vice and misconduct," and assigns the same as error. This was a statement of the law with respect to a hypothetical case. In it the Court did not say, as counsel urged that he did, that the appellant had such a gross vice, or that he had been guilty of such misconduct. The Court characterized drunkenness as a gross vice and as misconduct. The Court informed the jury that drunkenness, if proven, might be taken into consideration in determining whether the homicide was wilful and premeditated, and that the weight to be given to such fact, if found, was for the jury, and that they should receive evidence thereof with caution, and carefully consider it in connection with all the evidence in the case. The jury were told to carefully consider the evidence of drunkenness with all the other evidence. In this we find no error.

THE COURT PERMITTED

W. H. Dickson, private counsel, to aid the Assistant District Attorney in the prosecution of the defendant. This action of the court the defendant assigns as error. Counsel for appellant refer to subdivisions 2, 5 and 6 of section 257, Criminal Code, Laws of Utah, 1878: "The prosecuting attorney, or other counsel for the people, must open the cause and offer the evidence in support of the indictment. * * * When the evidence is all concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude the argument." As we construe the foregoing provisions they do not deprive the Court of the discretion to permit private counsel to aid the public prosecutor. The prosecuting attorney or other counsel for the people are mentioned in the provisions quoted except in connection with the closing sentence, and it is there stated that the prosecuting atttorney may conclude the argument.

It would be unreasonable to assume that the Legislature in the use of this language in the connection in which it appears, intended to deprive the Court of the discretion to permit counsel other than the public prosecutor to close the argument. The court should so control the argument as to prevent anything improper, any unfairness or injustice to the accused. This point was expressly decided in the case of People vs. Tidwell, *Pacific Reporter*, vol. 12, No. 2, p. 61.

The appellant also

ASKS FOR A REVERSAL,

for the reason as alleged that he did not have sufficient time to prepare for trial. The homicide occurred on the 14th day of July, 1887; the indictment was found on the 9th day of the following September; the appellant was arraigned and counsel appointed to defend him on the day following; on the 14th day of the same month he pleaded not guilty; a jury was impanelled on the 21st, and on the 24th of the same month returned a verdict of guilty. It does not appear that the defendant asked for further time to prepare for trial or that other material evidence could have been produced if the trial had been postponed.

The reason urged constitutes no sufficient ground for a reversal.

In the argument counsel suggested that the record shows that the appellant was sentenced to be executed publicly. The use of the word public in connection with the execution being a clerical error, the court below possesses the undoubted authority to correct the judgment in that respect. We do not regard it as a ground for a reversal.

We find no error in this record sufficient to authorize a reversal. The judgment of the court below is affirmed.

Boreman, Justice, concurs.